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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-
defendant

v.

APPLE INC.,

Defendant,
Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH

**REPLY IN SUPPORT OF APPLE INC.'S
MOTION TO STRIKE WRITTEN AND
ORAL TESTIMONY OF DR. MICHAEL I.
CRAGG REGARDING FOREIGN
REGULATORY SUBMISSIONS OF A NON-
PARTY**

Over Apple’s objection, Dr. Cragg offered opinions in both his written direct testimony (Ex. Expert 13 ¶ 71 & n.10) and at trial (Trial Tr. 2335:9–2340:16 (Cragg)) about a supposed “[REDACTED]” Spotify submitted in an advocacy submission to the Japan Fair Trade Commission. *See* PX-1152; PX-1153. Dr. Cragg twice assured the Court he had the “entirety of the Compass Lexecon report” underlying the short summaries he discussed on the stand. Trial Tr. 2339:21–24, 2344:8–17. Indeed, this April 9, 2019 “[REDACTED]” was the basis for Dr. Cragg’s asserted belief in the truth of Spotify’s JFTC submissions. Trial Tr. 2344:8–17.

Dr. Cragg’s representation to the Court was false. The Court directed Epic to submit the underlying [REDACTED], Trial Tr. 2344:24–2345:8, but Epic has instead given the Court a *different* [REDACTED] (dated [REDACTED]) apparently commissioned by Spotify that only concerns a *different* country ([REDACTED]). Brass Decl. ISO Br. to Strike Testimony of Dr. Cragg ¶ 3; Kung Decl. ¶¶ 6–7. This alone is reason to strike the testimony at issue: What Epic still has not told the Court is that while the Court directed Epic (the sponsor of Mr. Cragg’s opinions) to provide the report purportedly underlying the JFTC submission about which Dr. Cragg testified, Epic cannot do so because that report was never produced in this litigation—not by Dr. Cragg, not by Epic, and not by Spotify. Dr. Cragg’s opinions related to the Spotify JFTC submissions should be stricken.

Epic suggests—but does not certify—that the actual report underlying the JFTC submissions may have been clawed back by Spotify in mid-February. Stuckey Decl. ¶ 11. If true, that makes the present problem worse, not better. If Epic or Dr. Cragg retained a copy of those materials and relied upon them, but did not produce them to Apple, their use now is improper and unfair. If Epic and Dr. Cragg returned the materials, Dr. Cragg was not truthful when testifying to the Court about the provenance of his opinions. *See* Trial Tr. 2341:21–2342:1 (Cragg) (testifying [REDACTED] [REDACTED]). Either way, the outcome is the same: The Court should strike Dr. Cragg’s testimony on the JFTC submissions without any further sideshow about the merits or reliability of Spotify’s hearsay advocacy to foreign regulators.

Although irrelevant, Apple cannot be blamed for Epic’s inability to secure a trial witness—from a member of the “coalition” it formed to challenge Apple’s commissions—to provide percipient

1 knowledge about these documents or the underlying [REDACTED].” *See* Opp. at 1–2. As Epic admits,
 2 *Spotify* refused to produce a witness for a deposition before the close of fact discovery, and *Spotify*
 3 refused to testify at trial. *Id.* Epic, not Apple, is the proponent of the disputed opinion and bears the
 4 burden of establishing that Dr. Cragg can appropriately rely on the underlying records. *Wi-LAN Inc.*
 5 *v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1376 (Fed. Cir. 2021) (“The burden to establish reasonable
 6 reliance is on the proponent of challenged expert testimony.”). Had it sought to carry that burden
 7 through a deposition or trial witness, Apple would have had the opportunity to cross-examine a *Spotify*
 8 witness on the underlying records. Having failed to secure such a witness, Epic cannot blame Apple
 9 for failing to depose a third party on a document that none of Epic’s experts purported to rely on until
 10 well after the close of discovery.

11 Nor can Epic evade its obligations under the Federal Rules of Evidence by misstating the nature
 12 of the parties’ stipulations. The parties’ stipulations did not relieve either party from complying with
 13 the Court’s directive that “experts do not get to opine without a factual basis for their opinions.” Trial
 14 Tr. 501:25–502:1. The JFTC submission is not “within the scope of Rule 703” by any stretch of the
 15 imagination, and therefore the stipulation did not affect Apple’s right to object to Dr. Cragg’s reliance
 16 on it—as Apple repeatedly did. When Epic disclosed PX-1152 and PX-1153 as exhibits it might use
 17 with Dr. Cragg, Apple timely objected. Suppl. Brass Decl. ¶ 2. When Epic then said it would attempt
 18 to use those materials under Rule 703, Apple said it would object to that too. *Id.* And when Epic
 19 sought to elicit Dr. Cragg’s opinions on the stand, Apple again objected. Trial Tr. 2288:14–25 (Cragg).

20 As a last resort, Epic draws a false equivalency between Dr. Cragg’s and Prof. Hitt’s analyses.
 21 *See* Opp. at 4. But the differences could not be more stark. Prof. Hitt relied on *Spotify*’s transactional
 22 data, which was authenticated by a Rule 902 Declaration of Authenticity of Domestic Business Records
 23 from *Spotify*. Suppl. Brass Decl. Ex. A. Dr. Cragg’s source, by contrast, is an unauthenticated
 24 advocacy piece based on a study that is not in either party’s possession and has not been provided to
 25 the Court. To be sure, it is significant that *Spotify*’s own, authenticated transactional data
 26 “contradict[s]” the JFTC submission on which Dr. Cragg relies—just not for the reason Epic suggests.

1 Opp. at 4. In any event, Prof. Hitt’s reliance on authenticated business records does not support Epic’s
 2 attempt to rely on unauthenticated and unrelated “portions of [Spotify’s] production.” *Id.**

3 For these reasons and those set forth in Apple’s initial brief, the Spotify submissions are not the
 4 type of evidence on which experts in Dr. Cragg’s field would rely upon and cannot form the basis for
 5 any of his opinions. Dr. Cragg’s written and oral testimony relying on those submissions should be
 6 stricken, and the submissions themselves disregarded.

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 8 DATED: May 18, 2021

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 * Epic points out that Dr. Cragg testified that the data in the underlying report was “better than what typically an economist has access to.” Opp. at 1 (quoting Trial Tr. 2335:20–24). Dr. Cragg cannot possibly know whether the contents of a non-existent report is “better” or “worse” than anything. He made a false representation to the Court. Apple requests that the Court consider this testimony in evaluating Dr. Cragg’s credibility as well as reliability of his opinions and analyses.